Supreme Court, U.S.
FILED
JAN 16 1998
CLERK

No. 97-833

In the Supreme Court of the United States

OCTOBER TERM, 1997

MASSACHUSETTS STATE POLICE ASSOCIATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a duly-executed consent to extend the statute of limitations extended the period within which the Internal Revenue Service could assess a tax against petitioner.

2. Whether the annual publication by petitioner of "The Constabulary" constituted a regularly conducted trade or business that gave rise to unrelated business taxable income under Section 511 of the Internal Revenue Code, 26 U.S.C. 511.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 125 F.3d 1. The opinion of the United States Tax Court (Pet. App. 20a-53a) is reported at 72 T.C.M. (CCH) 582.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a) was entered on August 20, 1997. The petition for certiorari was filed on November 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 511-513 of the Internal Revenue Code, 26 U.S.C. 511-513, are set forth at Pet. App. 57a-59a.

STATEMENT

1. The State Police Association of Massachusetts is a tax-exempt labor organization. During the years at issue, petitioner annually published and distributed The Constabulary, a yearbook that contained articles and pictures of interest to petitioner's membership (Pet. App. 2a). The Constabulary also contained displays and listings paid for by businesses that had been solicited by petitioner for this purpose. Petitioner's officials routinely referred to The Constabulary as the "ad book" (*id.* at 22a). Each issue of The Constabulary contained a message urging its readers to "consider" the businesses appearing in the publication when making purchases (*id.* at 30a).

Commercial displays in The Constabulary ranged in size from one-sixth of a page to a full page, depending on the amount paid by the advertiser (Pet. App. 33a). The businesses that purchased displays were listed alphabetically in The Constabulary in an "Advertisers Index" or "Index to Display Ads." The Constabulary also contained business listings that consisted of two or three lines of information that identified the lister by name, address, and, in most issues, telephone number (*id.* at 29a-30a).

Petitioner hired a contractor to conduct the sale of displays and listings in The Constabulary. The contractor hired and supervised telephone solicitors who called potential advertisers using a script approved by petitioner. The telephone solicitors contacted businesses identified through the use of various busi-

ness directories. Petitioner monitored the solicitations, which were conducted during approximately 46 weeks of the year (Pet. App. 9a, 15a).

Petitioner published 5,000 to 7,000 copies of The Constabulary each year. Distribution of 300 to 400 copies took place at an annual picnic and sports day known as the Police Chase (Pet. App. 28a, 30a-31a).[1] The remaining copies of The Constabulary were distributed at state police barracks and to the advertisers who purchased displays and listings (*id.* at 31a).

During the tax years at issue in this case, petitioner's receipts from the sale of displays and listings in The Constabulary totaled $8,788,211. Those revenues yielded a net income of $3,752,288 (Pet. App. 32a). On November 13, 1989, petitioner filed IRS Forms 990 ("Return of Organization Exempt from Income Tax") for the periods ended April 30, 1986, 1987, 1988, 1989 and July 31, 1989. Those returns did not report any taxes due for those periods. Petitioner did not file any Forms 990-T ("Unrelated Business Taxable Income") to report the receipt of unrelated business taxable income during those periods (*id.* at 36a).

2. The Internal Revenue Service determined that petitioner's receipts from the sale of displays and listings in The Constabulary constituted advertising income subject to tax under Section 511 of the Internal Revenue Code, 26 U.S.C. 511. That Section imposes a tax on the "unrelated business taxable income" of an organization otherwise exempt from tax. "Unrelated business taxable income" is gener-

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[1] The Constabulary did not serve as a program guide for the Police Chase (Pet. App. 31a).

ally defined in Section 512 of the Code as the income realized from an unrelated trade or business that is "regularly carried on" (26 U.S.C. 512(a)(1)).

During the period that the statute of limitations on assessment of taxes for the above-described periods remained open,[2] petitioner's counsel executed a Form 872 that extended the time to assess "any Federal Income tax on any return(s) made by or for [petitioner] for the period(s) ended April 30, 1986, 1987, 1988, 1989 and July 31, 1989" to April 30, 1993 (Pet. App. 34a). Prior to the expiration of that extended period of limitations, the IRS issued a notice of deficiency that asserted that petitioner was liable for deficiencies in tax for each of the periods identified in the extension agreement, as well as for the periods ended July 31, 1990, and July 31, 1991 (for which the three-year assessment period was still open without extension) (*id.* at 3a-4a, 38a).

3. Petitioner sought review of the deficiency determination in the Tax Court. Following a trial, the Tax Court held petitioner liable for tax under Section 511 for the unrelated business income that it earned from the sale of advertising in The Constabulary (Pet. App. 20a-53a).

a. As a threshold matter, the Tax Court concluded that the statute of limitations on assessment of this tax remained open because of petitioner's execution of the Form 872 extension agreement. The court

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[2] The IRS generally must assess any tax within three years after the return is filed that gives rise to the tax liability. 26 U.S.C. 6501(a). That limitations period may be extended, however, by an agreement in writing executed by the taxpayer and a representative of the Internal Revenue Service prior to the expiration of the period of limitations. 26 U.S.C. 6501(c)(4).

rejected petitioner's argument that the Form 872 was ineffective, by its terms, because it extended only the time to assess taxes due "on any return[s] made by [petitioner]" and petitioner had filed no returns on which a liability for tax was reported. The court concluded that the extension agreement was designed to extend the period within which the IRS might assess any tax on petitioner's unrelated business taxable income (Pet. App. 35a-38a). The court further stated that *if* the Form 872 could not be construed in that manner, the court would reform the document to effectuate that clear intent of the parties (*id.* at 37a n.4).

b. The Tax Court held that petitioner's sale of displays and listings in The Constabulary constituted the trade or business of advertising. The court discounted the testimony of petitioner's expert witness, which was based upon "incomplete information" about petitioner's activities (Pet. App. 40a-41a). In concluding that petitioner was engaged in the trade or business of advertising, the Tax Court noted that the displays in The Constabulary contained the usual elements of advertisements—such as blocking, illustrations, signatures, trademarks, and emblems—and that The Constabulary included an "Advertiser's Index" (*id.* at 42a). The court also noted that petitioner and its contractors expressly referred to the displays and listings in The Constabulary as advertising (*id.* at 42a-43a).

The Tax Court also found that petitioner's advertising business was "regularly carried on" (26 U.S.C. 512(a)(1)). The court noted that petitioner had engaged contractors to act as petitioner's agents in soliciting advertising for, and publishing, The Constabulary over a period of several years (Pet.

App. 48a-49a). The court rejected petitioner's argument that only the activity of publishing The Constabulary—independent of the sales of advertising—could be considered. In particular, the court rejected petitioner's reliance on *NCAA* v. *Commissioner*, 914 F.2d 1417 (10th Cir. 1990), for that proposition. The Tax Court explained that, in *NCAA*, the court had defined the taxpayer's trade or business as the publication of advertisements in basketball programs during the time span of a basketball tournament. In the present case, by contrast, "petitioner's solicitation, sale, and publishing of advertising space was undertaken apart from any discrete event or show with a limited, specified duration" (Pet. App. 51a).[3] Because petitioner had regularly carried on its business, the court found petitioner liable for the tax imposed on unrelated business income under Section 511 of the Code (*id.* at 52a).

4. The court of appeals affirmed. The court agreed with the Tax Court that the Form 872 extended the statute of limitations on assessment of taxes under Section 511 of the Code. The court stated that petitioner was advancing "a purely linguistic argument" and, like the Tax Court, refused to accept petitioner's "slippery syllogism" (Pet. App. 4a). The court of appeals concluded that the Tax Court had correctly read the phrase "return(s) made" in the Form 872 to encompass returns "deemed" to be made (*id.* at 5a). The court of appeals found "non-sensical" petitioner's contention that the parties extended "the limitation period for assessment of taxes due on a return on

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[3] Petitioner did not dispute that an advertising trade or business was unrelated to its tax-exempt purposes (Pet. App. 8a n.3, 44a).

which, by operation of law, no tax conceivably could be due" (*ibid.*). The court stated that a document should not be construed to yield a nonsensical result; instead, it should be given a meaning that makes it "legally functional rather than * * * legally dysfunctional" (*ibid.*).[4] In view of this holding, the court of appeals found it unnecessary to consider the Tax Court's alternative conclusion that reformation of the Form 872 extension agreement to achieve the clear intent of the parties would be appropriate (*id.* at 7a n.2).

The court of appeals further agreed that petitioner's sale of displays and listings in The Constabulary constituted the trade or business of advertising (Pet. App. 9a-16a). The court of appeals observed that petitioner exercised "significant control over the sales effort, the handling of the funds generated, and the publication of The Constabulary" (*id.* at 9a). The court stated that "[e]ven a cursory glance at the yearbook, the pricing structure, and the terminology used by the Association belies the belated claim that the ads and listings were not 'advertising' as that term is commonly understood" (*id.* at 11a). The court noted that its conclusion in this case was supported by the similar holding of the Seventh Circuit in *Fraternal Order of Police* v.

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[4] The court of appeals noted that it was well settled that the filing of a Form 990 informational return starts the statute of limitations for assessing the unrelated business income tax, even where no unrelated business income tax return (Form 990-T) is filed. Petitioner could not link the two forms for purposes of starting the statute of limitations on assessment but then decouple the forms when construing an agreement to extend that statute of limitations (Pet. App. 6a).

Commissioner, 833 F.2d 717 (1987), which involved substantially similar facts (Pet. App. 11a-12a).

The court of appeals rejected petitioner's contention that its trade or business was not "regularly carried on by it" (26 U.S.C. 512(a)(1)). The court of appeals first noted that the decision of the Tenth Circuit in *NCAA* was inapposite because, in that case, "the advertising activity was tied to the program for a specific event" (Pet. App. 14a). The court explained that, in determining the regularity with which the business was carried on in *NCAA*, the Tenth Circuit had properly looked only to "the time frame of [a particular] event" (*id.* at 15a). By contrast, "[i]n a case like this one, where the publication of an ad book is not pegged to a particular event, a court must assay the activities which collectively comprise the business, and look to the overall time frame in which they occurred" (*ibid.*). Since petitioner's activities spanned 46 weeks each year, the court concluded that petitioner's business of advertising was conducted with "more than sufficient regularity by any standard" (*ibid.*).

The court of appeals rejected petitioner's argument that it did not carry on its advertising activity with the same entrepreneurial zeal of a commercial operator. The court noted that, although one purpose behind the unrelated business income tax was to create a more level playing field between taxable and tax-exempt enterprises, the unrelated business income tax does not require that competitive zeal or ability be demonstrated (Pet. App. 15a-16a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. As a general rule, taxes must be assessed within three years from the date a taxpayer files a return. 26 U.S.C. 6501(a). The Commissioner, however, ordinarily may not assess a tax based upon a deficiency until 90 days after a notice of deficiency has been issued to the taxpayer. 26 U.S.C. 6213(a). Moreover, if, during that 90 day period, the taxpayer petitions the Tax Court for review of the Commissioner's determination, the Commissioner ordinarily may not assess the tax until the decision of the Tax Court becomes final. 26 U.S.C. 6213(a); see 26 U.S.C. 7481.

The statutory period of limitation for assessment of a tax is suspended during the period that the Commissioner is prohibited from making an assessment. 26 U.S.C. 6503(a)(1). The consequence of these provisions, taken as a whole, is that the notice of deficiency must be issued within the limitations period provided in 26 U.S.C. 6501. Under Section 6501(c)(4) of the Code, however, the taxpayer and the Commissioner may agree in writing to extend the period of limitation at any time before it expires. Form 872 (Consent to Extend the Time to Assess Tax) is the form employed by the IRS for this purpose.

Petitioner claimed in the courts below that the language of the Form 872 was not effective to extend the period of limitations in this case because that Form extended only the period as to taxes "due on any return(s) made by" petitioner and the information

returns that petitioner had filed did not and could not report any taxes as being due (Pet. App. 4a, 37a). Those courts correctly held, however, that the Form 872 should be interpreted to make sense, rather than nonsense (*id.* at 5a). In view of the parties' evident intent to extend the period of limitations for the assessment of a tax on petitioner's unrelated business income, they correctly concluded that the "return(s) made" language of the Form 872 includes a "deemed" return on which unrelated business income was to be reported. As the court of appeals observed, it is "nonsensical" for petitioner to suggest that the parties sought to extend the statute of limitations with respect to a return on which no tax *could* be due (*ibid.*).

Petitioner does not directly attack the decision of the court of appeals. Instead, ignoring the conclusion of that court that the terms of the Form 872 reflect an effective agreement to extend the statute of limitations, petitioner seeks review of a question that was *not* reached by the court of appeals—whether the Tax Court has equitable jurisdiction to reform an instrument. Although the Tax Court noted that, if necessary, the language of the Form 872 could be reformed to effectuate the parties' intent (Pet. App. 37a n.4), that conclusion was not necessary to its decision because the court correctly held that the language of the Form 872 was sufficient and did not require reformation (*id.* at 37a-38a). The court of appeals also expressly concluded that it was unnecessary to reform the extension agreement to accomplish the parties' clear intent (*id.* at 7a n.2). The present case thus does not provide a suitable vehicle for addressing the question that petitioner seeks to raise.

2. a. Under Section 511 of the Internal Revenue Code, a tax-exempt organization is subject to tax on its unrelated business taxable income. Section 512 of the Code defines "unrelated business taxable income" as "the gross income derived by any organization from any unrelated trade or business * * * regularly carried on by it." 26 U.S.C. 512(a)(1). Income received by an otherwise tax exempt entity is thus taxable if derived from an activity that (i) is a trade or business, (ii) is regularly carried on and (iii) is not substantially related to the organization's exempt purpose. *United States* v. *American Bar Endowment*, 477 U.S. 105, 109-110 (1986); *United States* v. *American College of Physicians*, 475 U.S 834, 838-839 (1986).

The courts below correctly concluded that each of these factual elements of the test for "unrelated business taxable income" is satisfied in this case. Petitioner contracted with a firm to conduct telephone solicitations aimed at selling displays and listings in The Constabulary, an annual publication that petitioner's officials referred to as the "ad book." As the court of appeals stated, these displays and listings manifested all of the characteristics of advertising (Pet. App. 11a):

> the displays look like ads, the directory listings function as guides to products and services, and [petitioner] itself, at least during the first four years of the undertaking, consistently referred to the displays and listings as ads rather than as acknowledgements.

Moreover, petitioner's members supervised the conduct of the telephone solicitations, provided the scripts used by the telephone solicitors and moni-

tored the telephone solicitations to insure that they were conducted in accordance with petitioner's standards. The telephone solicitors worked approximately 46 weeks of the year selling displays and listings in The Constabulary (id. at 26-27a). The sales of advertising in The Constabulary generated more than $8 million in receipts and more than $3 million in profits for petitioner during the years at issue in this case (*id.* at 32a). On this record, the court of appeals properly affirmed the finding of the Tax Court that petitioner was engaged in the business of advertising and that such business was regularly carried on. That finding, concurred in by both courts below, does not warrant review by this Court. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

b. The decision of the courts below is consistent with the decision of the Seventh Circuit in *Fraternal Order of Police* v. *Commissioner*, 833 F.2d 717 (1987), which held on similar facts that payments for advertising listings in the journal of a tax exempt organization created unrelated business taxable income. Petitioner asserts (Pet. 6-12), however, that the decision in this case conflicts with the decision of the Tenth Circuit in *NCAA* v. *Commissioner*, *supra*, which held that income earned by the NCAA from the sale of advertising in the program guide for its annual basketball tournament was not taxable under Section 511 of the Code. In *NCAA*, the court concluded that the dissemination of the advertising during the course of the annual basketball tournament was too ephemeral an activity to be treated as "regularly carried on" for purposes of the tax on unrelated business income. 914 F.2d at 1423.

In the present case, however, there was no such ephemeral nature to the advertising activity of petitioner.[5] As the court of appeals noted (Pet. App. 14a-15a), the finding of the Tax Court that The Constabulary was not published for use in conjunction with any special event was well supported in the record. In determining whether the taxpayer's advertising activities are "regularly carried on," the court of appeals applied the same legal test to factually distinct records. Different factual applications of the same legal test do not establish a conflict of decisions that warrants review by this Court.[6]

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[5] The court of appeals therefore correctly concluded (Pet. App. 15a) that "the mode of analysis used in *NCAA* and *Suffolk County [Patrolmen's Benevolent Ass'n* v. *Commissioner*, 77 T.C. 1314 (1981)] cannot be employed here." As in *NCAA*, the court concluded in *Suffolk County* that income earned by a tax-exempt organization from the sale of advertising in the program of its annual vaudeville show was not subject to tax under Section 511 because advertising was not "regularly carried on" by the taxpayer. 77 T.C. at 1321. As the Tax Court noted in the present case, however (Pet. App. 50a), the court in *Suffolk County* regarded the advertising activity of the taxpayer to be connected only with its annual vaudeville show.

[6] Petitioner further contends (Pet. 15) that the Court should "strik[e] down" Proposed Treasury Regulation § 1.513-4 because it discriminates unjustifiably between different tax exempt organizations. A proposed regulation is not a proper subject of litigation. Nor was it applied in this case. In any event, petitioner did not challenge the validity of the proposed regulation in the court below and review of a contention that was not raised or addressed below is not warranted. See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 377-378 (1996); *Holly Farms Corp.* v. *NLRB*, 116 S. Ct. 1396, 1402 n.7 (1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1998